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No. 73-608

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In the Supreme Court of the United States

OCTOBER TERM, 1973

HOUSTON CHRONICLE PUBLISHING COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. On April 13, 1962, petitioner purchased land with improvements known as the Bering-Cortes Building for a total price of $290,000, of which $151,426 was allocated to the building. After receipt of a study by a consulting engineer in November 1962, petitioner's board of directors resolved in January 1963, that use of the building in its newspaper publishing operation was not feasible and that the building should be abandoned. From September 1964, until October 1965, petitioner purchased the properties surrounding the building. In 1966, it demolished all improvements and erected a new building suitable for its operations. The Bering-Cortes Building was never used in petitioner's operations. On its 1963 federal income tax return, petitioner deducted as an abandonment loss $151,426,

the part of the purchase price allocated to the building. On audit, the Commissioner disallowed the deduction (Pet. App. A 50-51).

In an income tax refund suit before a jury, petitioner contended that when it purchased the property, it intended to use the building in its operations, and that it was unaware of the unsuitability of the building.[1] The government contended to the contrary. This factual issue was submitted to the jury on the following special interrogatory (Pet. 4; Pet. App. A 54):

> At the time of the purchase by the Chronicle of the Bering-Cortes Building, did the Chronicle intend to use that building in its business of publishing a newspaper?

The district court instructed the jury that in resolving the question, it should consider the facts and circumstances surrounding the purchase, including the time between acquisition and the date the intent to demolish was formed, the suitability of the building at the time of purchase, the use of the building in petitioner's operations, subsequent changes in economic or business conditions, and subsequent changes in the property (R. 234-235).[2] The district court rejected petitioner's requested instruction that "intent" referred to a "dominant intent" to abandon the property (R. 267; Pet. App. A 54-55). The jury found that petitioner did not intend to use the building in its business and judgment on this issue was entered in favor of the United States

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[1] Petitioner did not contend that it intended to use the building for any other purpose.

[2] "R." references are to the record appendix in the court of appeals.

(Pet. App. A 55). The court of appeals affirmed (Pet. App. A 55-62).

2. Section 165(a) of the Internal Revenue Code of 1954 provides for a deduction from gross income for losses incurred during the taxable year. The Regulations disallow the deduction in cases where there is a claimed loss resulting from the demolition of a building if, at the time the building is purchased, the taxpayer intended, whether immediately or subsequently, to demolish it. Treasury Regulations (1954 Code), §1.165-3(a). Here, petitioner claimed that it purchased the Bering-Cortes Building with the intent to use it in its newspaper business. This factual issue was presented to the jury by means of a special interrogatory asking whether petitioner intended to use the building in its newspaper business at the time of its purchase. The jury answered this question in the negative.

Petitioner's sole contention here (Pet. 5-9), rejected by both courts below, is that it was entitled to a jury instruction that disallowance of the claimed demolition required a finding that petitioner's "dominant intent" was to abandon the building. As the court of appeals correctly held (Pet. App. A 61), however, the jury's negative response foreclosed the possibility that petitioner had any intent to use the building in its business. Under the jury verdict, petitioner's sole intent was to abandon the building. The requested instruction was therefore superfluous.

3. Contrary to petitioner's assertion (Pet. 6), there is no conflict between the decision below and *Meyer* v. *United States*, 362 F. 2d 264 (C.A. 1), affirming *per curiam*, 247 F. Supp. 939 (D. Mass.). There, the taxpayer had purchased several parcels of real property with existing structures. He had verbal commitments

with potential lessees which provided for the construction of a new building on each parcel. The taxpayer contended that he maintained at all times a contingent intention to continue to hold the existing structures on these parcels of property in the event that his verbal agreements were not reduced to writing. In an opinion adopted by the First Circuit in its *per curiam* order, the district court found that taxpayer's "virtually absolute" intention was to demolish the buildings, and that he was therefore not entitled to a Section 165 deduction.

The court noted in *dictum,* however, that the Regulation's use of the term "intent" should be read to refer to the taxpayer's dominant intention. The need for this discussion in *Meyer* arose on account of the taxpayer's assertion of two mutually inconsistent motives in purchasing the building—to demolish and to rebuild if his leases were reduced to writing or, alternatively, to maintain the buildings if no such leases were concluded. Here, however, petitioner has not asserted that he purchased the Bering-Cortes Building with dual purposes. Rather, its sole claim was that it had intended to use the building in its business. The jury's finding to the contrary precludes the possibility that petitioner had maintained anything other than a dominant intention to abandon the building.

There is similarly no merit to petitioner's contention (Pet. 8) that the district court's refusal to give the "dominant intent" instruction conflicts with *United States* v. *Generes,* 405 U.S. 93. That case involved the question whether funds supplied to a corporation by a shareholder-employee constituted a business bad debt within the meaning of Section 166(d) of the Code. In such cases, where there are arguably dual motivations involved, the "dominant motivation" instruction is

appropriate. Where, as here, there are no competing motives and the issue is simply whether or not petitioner intended to use the building in its business, a "dominant intention" instruction would have been unwarranted.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.

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